Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

SALVATORE J. PRESUTTI,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for the Bank of Hartford,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In this case, a jury verdict was entered for Petitioner on June 6, 2000. A judgment was entered for him on June 22, 2000. No appeal of the judgment was ever filed. The Judge entered an amended judgment on January 10, 2001, almost six months after the judgment, in response to a motion by respondent for judgment as a matter of law made prior to the judgment, and stated in an endorsement order that he did not do so in reliance on Rule 60 of the Federal Rules of Civil Procedure.

The question presented is whether, if the ten day period set forth in Rule 50 for renewing a request for judgment as a matter of law and in Rule 59 for a new trial under the Federal Rules of Civil Procedure, and the 30 day period for appeal of a judgment set forth in Rule 4(a)(1), have passed without a motion under Rule 50 or 59 or an appeal, the judgment is final.

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

Neither the Judgment, dated June 22, 2000 or the amended Judgment, dated January 10, 2001 of the district court is otherwise published, and the opinion of the court of appeals filed on December 20, 2001 is not otherwise published.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion on December 20, 2001. Petitioner invokes this Court's jurisdiction under 28 U.S.C. Section 1254(1). A United States Court of Appeals has decided an important question of federal law relating to the finality of judgments and the meaning of Rule 50 of the Federal Rules of Civil Procedure in a way that conflicts with a relevant decision of this Court.

RULES INVOLVED

The provisions of Sections 50, 59 and 60 of the Federal Rules of Civil Procedure are set forth at Appendix F.

STATEMENT OF THE CASE

The case was filed against the Bank of Hartford in Connecticut Superior Court. The complaint was based on an incident at a building on which the Bank of Hartford held a mortgage. The gravamen of the complaint was that agents of the Bank of Hartford activated a monitoring system owned by petitioner in that building which caused the petitioner to be confronted by a police officer in combat position with a loaded pistol. The Bank of Hartford failed, and the FDIC removed the case to federal district court.

A jury trial was held, and on the jury found for petitioner on two counts. On June 15, 2000 the FDIC renewed an earlier motion, asking for judgment notwithstanding the verdict. On June 22, 2000 a judgment was entered on the two counts on

which the jury found for the petitioner. On July 4, petitioner Presutti filed a motion requesting counsel fees. On July 25, 2000, long after any request under Rule 50 or appeal of the verdict should have been filed, the FDIC moved for additional time to respond to the motion for counsel fees "until 20 days following the decision of the court on the defendant's Post Trial Rule Motion." Presutti objected to the FDIC's motion, noting that the time for appeal had passed and stating that "The judgment, therefore, is final."

On January 3, 2001, the district court issued an order vacating the judgment entered on June 22, 2000, and on January 10, 2001, issued an amended judgment, which denied any recovery to petitioner. On January 22, 2001, six months to the day from the date the original judgment was entered, the district judge denied a motion of petitioner to alter or amend the judgment and stated that he did not rely on Rule 60 to amend the judgment. Rule 60 could have been used to amend the initial judgment if it had been by clerical error or similar mistake, but it was not.

Petitioner had a judgment in his favor for six months, and then lost it. He lost it even when there was no appeal of the judgment! The circuit court said that the motion for judgment notwithstanding the verdict was a sufficient appeal because it was filed before the entry of the judgment, citing the Advisory Committee Notes for the 1995 amendments to the Federal Rules of Civil Procedure, that "The phrase 'no later than' is used — rather than 'within' — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." But that relates to a "post-judgment" motion, not a motion when there is no judgment. There was no "post-judgment" motion, because at the time the motion was made, there was no judgment.

If a judge gives an Order, as the district judge did in his Order of January 3, 2001, stating that he *will* give judgment in a certain manner, or if he even states he will from the bench,

then the scope of the judgment is known and an appeal can be filed earlier. But when he has given no indication of what his judgment will be, it is fantasy to characterize it as a "post-judgment" motion. This is a perversion of the Federal Rules of Civil Procedure.

In *Johnson, Administratrix v. New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48 (1952), this Court stated:

> On several recent occasions we have considered Rule 50(b). We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment. [at 50]
>
> . . .
>
> Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. [at 52]
>
> . . .
>
> Rule 50(b) as written and as construed by us is not difficult to understand or to observe. [at 53]

The second circuit has also ignored its own prior decisions. In *Fruit of the Loom, Inc. v. American Marketing Enterprises, Inc.*, 192 F.3d 73 (2d Cir. 1999), defendant American Marketing Enterprises ("AME") served a motion on plaintiff Fruit of the Loom within 10 days, but received permission from the district judge to file it after the 10 day period. The Court decided that the Judge lacked the authority to permit the filing of a 50(b) motion "outside of the 10-day window for filing post-judgment motions, dismissed the appeal for lack of jurisdiction, and gave a general notice to the bar, stating at 74:

> We write to remind the bar that the individual practice rules of a district Judge must be read in

> conjunction with the Federal Rules of Civil Procedure and that the Federal Rules and their jurisdictional filing dates supersede any seemingly contrary district court practice rule.

In the following year, the second circuit decided *Weissman v. Dawn Joy Fashions, Inc.*, 214 F.3d 224 (2d Cir. 2000). It dismissed defendant's appeal from a final judgment because defendant did not file its motion for judgment as a matter of law within the ten day time period required under Rule 50(b). The circuit court determined that the district court lacked the power to extend the time to file its post-trial motion, and the district court had no power to modify the trial verdict. However, it decided that, while the district court lacked jurisdiction to do so, the circuit court could review the sufficiency of evidence, since the plaintiff appellee and cross-appellant failed to raise the timeliness issue in the district court or on appeal, and therefore waived any objection.

The instant case differs from *Weissman v. Dawn Joy Fashions, Inc. supra*, in that Presutti never waived the lack of timeliness, and in fact raised it in each subsequent filing with the district court.

This case underlines the reason for the rule. For six months, Presutti had a judgment creditors could rely on, which gave him some compensation and made him feel vindicated. Then it was taken away.

After the 10 day period had expired, Mr. Presutti's attorney told him the judgment was final. The fact that his attorney thought so is indicated by the fact that on June 18, 2000 he moved to request additional time to respond to defendant's motion for directed verdict. When he received the June 22, 2000 judgment, he ceased researching the question, and 10 days thereafter, considered it settled and moved for counsel fees pursuant to the judgment on July 4, 2000. In every motion after that, until the Order of January 3, 2001, he argued only as to the failure of defendant to file within the ten day period. Only after

the January 3 Order, which vacated the original judgment, did he address the questions raised in the defendant's June 15, 2000 memorandum, and then inadequately, in an attempt to obtain oral argument on the point to find out why the Order was issued.

Rule 50 of the Federal Rules of Civil Procedure was adopted for uniformity. In *Rezzonico and Rezzonico v. H & R Block, Inc. et al.*, 182 F.3d 144 (2d Cir. 1999), involving the 30 day time limit for filing an appeal pursuant to Fed. R. App. P. 4(a)(1), the second circuit stated at 150:

> Rule 4(a), which sets out the 30-day time limit within which this appeal had to have been taken, serves the salutary purpose of fixing the point at which litigation shall end — if an appeal has not been taken before that date — thereby relieving prospective appellees of the demands appellant is making against them.

Rule 50 and Rule 4(a) are the only way to know that the litigation is done. The case is at rest, and the judgment is final, once the relevant time period passes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 20th day of DEC two thousand and one.

Present: JAMES L. OAKES,
RICHARD J. CARDAMONE,
ROSEMARY S. POOLER,

Circuit Judges.

(01-6044)

SALVATORE J. PRESUTTI,

Plaintiff-Appellant,

-v-

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for the Bank of Hartford,

Defendant-Appellee.

Appendix A

Appearing for Appellant: John C. Peters, Avon, CT
Appearing for Appellee: John B. Farley, Halloran & Sage LLP, Hartford CT

Appeal from the United States District Court for the District of Connecticut (Thompson, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Salvatore J. Presutti appeals from an amended judgment of the United States District Court for the District of Connecticut (Alvin W. Thompson, *Judge*) that set aside a jury verdict in Presutti's favor for conversion and violation of Connecticut's Unfair Trade Practices Act ("CUTPA") and from an order refusing to further amend the amended judgment.

In March 1988, the Bank of Hartford ("Bank") entered into a mortgage loan transaction with Presutti, Joseph P. Kennedy ("Kennedy"), and Joseph P. Kennedy, Trustee, for 825-829 Wetheresfield Avenue ("Premises").[1] In connection with the mortgage, the mortgagors executed a collateral assignment of leases and rentals, which listed Park Place Properties, Presutti's and Kennedy's partnership, as the ground floor tenant of the Premises. On June 6, 1993, the Bank commenced a foreclosure action against the mortgagors, and on November 2, 1993, title to the Premises vested in the Bank.

On December 1, 1992, following the mortgagors' default, the Bank entered into a contract with MC Building

1. We adopt the facts set forth in appellee's brief, which appellant does not dispute.

Services, Inc. ("MC") to manage and maintain the Premises. At that time, the ground floor of the Premises was equipped with a security alarm which Park Place Properties had purchased from Sonitrol, Inc. Presutti refused to give MC the security code needed to arm and disarm the system. Therefore, with the Bank's permission, MC had the alarm system repaired and arranged for Sonitrol to monitor the system. Presutti subsequently entered the premises, set off the alarm, and was confronted by a police officer.

In August 1993, Presutti filed a lawsuit for, among other things, conversion of the alarm system and violation of CUTPA in the Connecticut Superior Court. In 1995 the Federal Deposit Insurance Corporation ("FDIC"), as receiver for the Bank, removed the lawsuit to the federal district court.

A jury heard Presutti's claims and FDIC's defense between May 30 and June 6, 2000. At the close of plaintiff's proof, defendant moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50, and the court reserved decision. On June 6, 2000, the jury returned a verdict in favor of Presutti and awarded him damages of $1,129. The FDIC orally renewed its motion immediately following the jury verdict, and the court granted the FDIC permission to file its memorandum of law at a later date. On June 19, 2000, the FDIC filed a formal written motion supported by a memorandum of law. The next day, Presutti requested an extension of time to respond to the FDIC's motion. Judge Thompson granted the requested extension. On June 22, 2000, the Clerk entered judgment in Presutti's favor. Presutti moved for counsel fees and costs on July 5, 2000, and, on July 25, 2000, the FDIC requested that its time to respond to the attorney's fee motion be extended to twenty days after the court's decision on the Rule 50 motion. Presutti objected to the motion, arguing that the court already had

ruled on the Rule 50 motion by allowing judgment to be entered. The court granted an extension before receiving Presutti's objection.

On January 3, 2001, the court granted the FDIC's motion. It held that

> For the reasons set forth in Part I of the defendant's memorandum dated June 15, 2000, the plaintiff failed to establish an ownership interest in the property sufficient to support a claim for conversion; rather, as a matter of law, the plaintiff's evidence established that the security system was the property of a partnership, Park Place Properties.
>
> In addition, the defendant is entitled to judgment as a matter of law on the Eighth Count, the CUTPA claim, because in the absence of a showing that the defendant's actions constituted a conversion, there is no other conduct on the part of the defendant which could support a finding of a CUTPA violation.

An amended judgment reflecting this holding was entered on January 10, 2001. Presutti then moved for a second amended judgment, arguing that the FDIC did not make its motion in the time period required by Fed. R. Civ. P. 50, the court could not rely on Fed. R. Civ. P. 60, and the court made a legal error in determining that Presutti did not have a sufficient ownership interest to support a conversion claim. The court denied this request on January 22, 2001. It found that the FDIC "orally renewed its motion for judgment as a matter of law immediately following the jury verdict" and that "[t]he court did not rely on Rule 60."

On appeal, Presutti makes the counter-intuitive argument that the FDIC failed to make a timely motion because both its oral motion and its written motion were made before the entry of judgment. Rule 50(b) does not require that a motion be made after the entry of judgment; instead it provides that the non-prevailing party may file its "motion no later than 10 days after entry of judgment." As the Advisory Committee Notes for the 1995 amendments to Rule 50 state: "The phrase 'no later than' is used — rather than 'within' — to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." Because the FDIC filed a written motion *before* the entry of judgment, its motion was timely.

Presutti also argues that entry of the June 22 judgment constituted a denial of the FDIC's earlier motion, requiring the FDIC to move against the judgment. This argument contradicts the record. As indicated by the chronology previously set forth, Judge Thompson did not regard the June 22 judgment as resolving the Rule 50 motion. Nor is there any indication in the record that Judge Thompson approved the form of the verdict pursuant to Rule 58(2) of the Federal Rules of Civil Procedure. Finally, Presutti does not offer any persuasive authority for his argument that the entry of judgment by a clerk disposes of a pending Rule 50 motion where it does not purport to address that motion.

Presutti next argues that the substance of the district court's holding was erroneous because (1) it contradicts the jury's specific finding that Presutti owned the alarm system in violation of the Seventh Amendment to the United States Constitution; (2) the FDIC itself argued that the arrangement between Presutti and Kennedy was a joint venture or agency agreement not a partnership; and (3) it is not necessary under Connecticut law to have title to property to recover for conversion.

Rule 50 specifically allows the district court to set aside a jury verdict if "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of surmise and conjecture." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). Granting a Rule 50(b) motion does not offend the Seventh Amendment "where the evidence, viewed most favorably to the party against whom the judgment is entered, would not be sufficient to support a verdict in that party's favor." *Shore v. Parklane Hosiery Co.*, 565 F.2d 815, 819 (2d Cir. 1977), *aff'd* 439 U.S. 322 (1979). Thus our task is to determine whether the district court correctly concluded that there was no evidence to support the jury's finding that Presutti owned the alarm system. We review the district court's decision *de novo* but use the same standards that it must apply. *United States v. Daccarett*, 6 F.3d 37, 59 (2d Cir. 1993).

Our review is complicated by plaintiff's failure to supply the trial transcript and to identify any facts overlooked by the district court that indicate the security system was owned by him individually rather than by Park Place Properties. Moreover, plaintiff accepts the FDIC's version of the facts, which includes assertions that Park Place Properties was a partnership between Presutti and Kennedy and that Park Place Properties purchased the security system. Instead of pointing to evidence in the record, Presutti relies on a portion of the FDIC's brief below as a concession that Presutti owned the alarm system. However, the cited portion of the brief addresses ownership of the building, not ownership of the security system. Therefore, Presutti's claim that the FDIC conceded his argument is disingenuous. We discern no basis for setting aside the district court's conclusion that Presutti's own proof established that the partnership owned the security system.

Presutti contends correctly that he need not prove that he held title to the security system in order to maintain a claim for conversion. *See Devitt v. Manulik*, 410 A.2d 465, 467 (Conn. 1979). However, the only basis other than absolute ownership that Presutti urged to the district court was that, as a partner in the partnership, he was an owner of the alarm system. This claim is contradicted by Connecticut law which provides that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually." Conn. Gen. Stat. Ann. § 34-315 (1997). Although Presutti now suggests that there may be other interests sufficient to enable him to maintain a conversion action, we will consider an issue not passed on below only if it is purely legal and there is no need for fact finding or "consideration of the issue is necessary to avoid manifest injustice." *Krumme v. Westpoint Stevens, Inc.*, 238 F.3d 133, 142 (2d Cir. 1992) (internal quotation marks omitted). Because Presutti does not identify a legal issue that can be resolved on the record before us and there is no apparent basis for concluding that we must act to avoid a manifest injustice, we decline to address these additional arguments.

FOR THE COURT
ROSEANN B. MACKENCHNIE, Clerk
By: s/ Armstrong

APPENDIX B — ENDORSEMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 22, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO. 3:95CV00651 (AWT)

SALVATORE PRESUTTI,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD,

Defendant.

ENDORSEMENT ORDER

The plaintiff's motion to alter or amend the court's judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure [Doc. # 131] is hereby DENIED. As noted by the defendant in its objection [Doc. # 133], the defendant orally renewed its motion for judgment as a matter of law immediately following the jury verdict, and obtained permission to file subsequently its memorandum of law. The court did not rely on Rule 60.

It is so ordered.

Dated this 22nd day of January, 2001, at Hartford, Connecticut.

s/ Alvin W. Thompson
Alvin W. Thompson
United States District Judge

APPENDIX C — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 10, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:95CV651 (AWT)

SALVATORE J. PRESUTTI

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for the BANK OF HARTFORD

AMENDED JUDGMENT

This action came before the court for a trial by jury before the Honorable Alvin W. Thompson, and the issues were duly tried. Counts two and six were dismissed on the first day of trial, and the jury rendered its verdict on the remaining counts. Judgment entered on June 22, 2000 for the plaintiff Salvatore Presutti, against the Bank of Hartford, in the amount of $1,129 in damages plus statutory interests, attorneys fees and costs.

Following the jury verdict, the defendant renewed its motion for judgment as a matter of law on the Fourth and eighth counts. The court granted the defendant's motion, and instructed the clerk to vacate the above judgment, and enter judgment in favor of the defendant in this case.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment of June 22, 2000 is hereby VACATED, and shall be amended as follows:

Appendix C

This action having come on for consideration of the defendant's motion for judgment as a matter of law following the jury verdict before the Honorable Alvin W. Thompson, United States District Judge and,

The court having considered the full record of this case including applicable principles of law, and having filed its order granting the defendant's motion and instructing the clerk to enter judgment in favor of the defendant; it is therefore,

ORDERED, ADJUDGED and DECREED that judgment be and is hereby entered in favor of the defendant Bank of Hartford.

Dated at Hartford, Connecticut, this 10th day of January, 2001.

KEVIN F. ROWE, Clerk

By s/ Sandra Smith
Sandra Smith
Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JANUARY 3, 2001

Civil Action: 3:95cv651 (AWT)

SALVATORE J. PRESUTTI,

Plaintiff,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD

Defendant.

ORDER

Following the jury's verdict, the defendant renewed its motion for judgment as a matter of law on the Fourth Count, which sets forth a claim for conversion of a security system, and the Eighth Count, which sets forth a claim under CUTPA. The defendant's motion for judgment as a matter of law on the Fourth Count should be granted. For the reasons set forth in Part I of the defendant's memorandum dated June 15, 2000, the plaintiff failed to establish an ownership interest in the property sufficient to support a claim for conversion; rather, as a matter of law, the plaintiff's evidence established that the security system was the property of a partnership, Park Place Properties.

In addition, the defendant is entitled to judgment as a matter of law on the Eighth Count, the CUTPA claim, because in the absence of a showing that the defendant's actions constituted a conversion, there is no other conduct on the part of the defendant which could support a finding of a CUTPA violation.

Appendix D

Accordingly, the judgment entered in favor of the plaintiff (doc. # 120) is hereby VACATED, and the clerk is ordered to enter judgment in favor of the defendant. In addition, the plaintiff's motion for costs and fees and for attorney's fees (doc. ## 122 and 126) and the plaintiff's motion for reconsideration (doc. # 125) are hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut this 3rd day of January 2001.

s/ Alvin W. Thompson
Alvin W. Thompson
United States District Judge

APPENDIX E — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT DATED AND FILED JUNE 22, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CASE NO. 3:95CV-651

SALVATORE PRESUTTI

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver for The Bank of Hartford

JUDGMENT

This action came before the court for a trial by jury before the Honorable Alvin W. Thompson, United States District Judge presiding, and the issues having been duly tried and the jury having rendered its verdict in favor of the plaintiff and against the defendant, it is hereby

ORDERED, ADJUDGED and DECREED that the judgment be and is hereby entered in favor of the plaintiff in the amount of $1,119 in compensatory damages and nominal damages on the CUTPA claim in the amount of $10, for a total of $1,129, plus statutory interest and attorney fees and costs.

Dated at Hartford, Connecticut, this 22nd day of June, 2000.

KEVIN F. ROWE, Clerk

By s/ Sandra Smith
Sandra Smith
Deputy Clerk

APPENDIX F — RELEVANT FEDERAL RULES OF CIVIL PROCEDURE

FEDERAL RULE OF CIVIL PROCEDURE 50

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

Appendix F

(1) if a verdict was returned:

(A) allow the judgment to stand,
(B) order a new trial, or
(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or
(B) direct entry of judgment as a matter of law.
(C) Granting Renewed Motion for Judgment as a Matter of Law; Conditional Rulings; New Trial Motion

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered shall be filed no later than 10 days after entry of the judgment. (d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the

appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

FEDERAL RULE OF CIVIL PROCEDURE 59

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. Any motion for a new trial shall be filed no later than 10 days after entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be filed with the motion. The opposing party has 10 days after service to file opposing affidavits, but that period may be extended for up to 20 days, either by the court for good cause or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Court's Initiative; Notice; Specifying Grounds. No later than 10 days after entry of judgment the court, on its own, may order a new trial for any reason that would

justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

FEDERAL RULE OF CIVIL PROCEDURE 60

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise

vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title *28, U.S.C., § 1655*, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
MAY 24 2002
OFFICE OF THE CLERK

No. 01-1417

In the Supreme Court of the United States

SALVATORE J. PRESUTTI, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR THE BANK OF HARTFORD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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QUESTION PRESENTED

Whether a district court clerk's entry of judgment on a jury verdict precluded the court from granting a motion for judgment as a matter of law, where the motion was renewed after the verdict was announced and before the clerk entered the judgment and where the judgment entered by the clerk was not approved by the court and made no reference to the pending motion.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unpublished, but the decision is available at 24 Fed. Appx. 92. The orders and amended judgment of the district court (Pet. App. 8a, 9a-10a, 11a-12a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 20, 2001 (Pet. App. 1a). The petition for a writ of certiorari was filed on March 20, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1993, petitioner sued the Bank of Hartford in Connecticut Superior Court, alleging various violations of Connecticut law. Pet. App. 3a. The Bank later failed, and the Federal Deposit Insurance Corporation (FDIC) was substituted for the Bank in its capacity as receiver. *Ibid.* The FDIC removed the case to the United States District Court for the District of Connecticut. *Id.* at 2a-3a.

A jury trial was held between May 30 and June 6, 2000. Pet. App. 3a. At the close of petitioner's case, the FDIC moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. *Ibid.* The court reserved decision, and submitted the case to the jury. *Ibid.* On June 6, 2000, the jury returned a verdict in favor of petitioner and awarded damages of $1129. *Ibid.*

Immediately after the verdict, the FDIC orally renewed its motion for judgment as a matter of law. Pet. App. 3a. The district court granted the FDIC permission to file its memorandum of law at a later date. *Ibid.* On June 19, 2000, the FDIC filed a written motion for judgment as a matter of law that was supported by a memorandum of law. *Ibid.* On June 20, petitioner asked for and received an extension of time in which to reply to the FDIC's motion. *Ibid.*

On June 22, 2000—two days later—a deputy district court clerk signed an order rendering judgment in favor of petitioner. Pet. App. 13a; see Fed. R. Civ. P. 58(1) (stating that the clerk "shall * * * enter the judgment without awaiting any direction by the court" after "a general verdict of a jury"). The order made no reference to the FDIC's pending motion for judgment as a matter of law. Pet. App. 13a.

On July 5, 2000, petitioner filed a motion seeking counsel fees and costs. Pet. App. 3a. On July 25, the FDIC requested that its time to respond be extended to 20 days after the court's decision on its pending motion for judgment as a matter of law. *Ibid.* The district court granted the FDIC's motion before receiving petitioner's response, which asserted that the court had already disposed of the Rule 50 motion by rendering judgment in his favor. *Id.* at 3a-4a.

On January 3, 2001, the district court granted the FDIC's motion for judgment as a matter of law, vacated the judgment in favor of petitioner, and directed the clerk to enter judgment in favor of the FDIC. Pet. App. 11a-12a. The court also denied petitioner's motion for fees and costs. *Ibid.* On January 10, the clerk entered the order as directed by the court. *Id.* at 9a-10a.

Petitioner then filed a motion to amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), arguing that the FDIC had not made its motion within the time required by Federal Rule of Civil Procedure 50 and that the court's actions could not be justified based on Federal Rule of Civil Procedure 60. Pet. App. 4a. Petitioner also argued that, on the merits, the FDIC had not been entitled to judgment as a matter of law. *Ibid.*

On January 22, 2001, the district court denied petitioner's motion. Pet. App. 8a. The court noted that the FDIC had "orally renewed its motion for judgment as a matter of law immediately following the jury verdict, and obtained permission to file subsequently its memorandum of law." *Ibid.* The court stated that it had "not rel[ied] on Rule 60" in granting the FDIC's motion. *Ibid.*

2. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-7a. The court first

rejected petitioner's "counter-intuitive" argument that the FDIC's renewed motion for judgment as a matter of law had been untimely because it had been made before the entry of judgment. *Id.* at 5a. The court noted that Federal Rule of Civil Procedure 50(b) provides that such motions must be made "no later than 10 days after entry of judgment," and quoted language from the Advisory Committee Notes stating that "[t]he phrase 'no later than' is used—rather than 'within'—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk." Pet. App. 5a (quoting Fed. R. Civ. P. 50 advisory committee's note (1995 amend.)). "Because the FDIC filed a written motion *before* the entry of judgment," the court of appeals reasoned, "its motion was timely." *Ibid.*

The court of appeals also rejected petitioner's contention "that entry of the June 22 judgment constituted a denial of the FDIC's earlier motion, requiring the FDIC to move against the judgment." Pet. App. 5a. It stressed that the district court "did not regard the June 22 judgment as resolving the Rule 50 motion," and stated that the record was barren of "any indication" that the district court approved the form of the verdict pursuant to Federal Rule of Civil Procedure 58(2). Pet. App. 5a. The court also observed that petitioner had not offered "any persuasive authority for his argument that the entry of judgment by a clerk disposes of a pending Rule 50 motion where it does not purport to address that motion." *Ibid.*

ARGUMENT

The unpublished decision of the court of appeals is correct, and does not conflict with the decisions of this Court or those of any other court of appeals. The un-

published decision correctly disposes of a claim that a district court clerk made a material error in entering judgment in the amount of $1129. Further review by this Court is not warranted.

1. The FDIC timely renewed its motion for judgment as a matter of law. Federal Rule of Civil Procedure 50(a)(1) states that a party may move for judgment as a matter of law after the opposing party "has been fully heard on an issue." The FDIC made such a motion at the close of petitioner's case, but the district court reserved decision and submitted the case to the jury. Pet. App. 3a. Rule 50(b) provides that a party that made a pre-verdict motion "may renew its request for judgment as a matter of law by filing a motion *no later than* 10 days after entry of judgment." Fed. R. Civ. P. 50(b) (emphasis added). Because the FDIC's renewed motion for judgment as a matter of law was made on June 6, 2000— *before* judgment was entered —it was timely under Rule 50(b). See Fed. R. Civ. P. 50 advisory committee's note (1995 amend.) ("The phrase 'no later than' is used —rather than 'within'—to include post-judgment motions that sometimes are filed before actual entry of the judgment by the clerk.").[1]

2. Petitioner is incorrect in arguing (Pet. 3) that the decision below conflicts with this Court's decision in *Johnson* v. *New York, New Hampshire & Hartford R.R.*, 344 U.S. 48 (1952). In *Johnson*, this Court held that a post-verdict motion for a new trial neither

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[1] Petitioner does not contend that the FDIC's renewed motion for judgment as a matter of law was not "filed" because it was made orally. See, *e.g.*, Pet. 1 ("On June 15, 2000 the FDIC renewed an earlier motion, asking for judgment notwithstanding the verdict."). Nor did he make such an argument before the court of appeals.

renewed a pre-verdict motion for a directed verdict, nor subsumed within it a motion for judgment notwithstanding the verdict. *Id.* at 54. Because the FDIC *did* make a post-verdict motion for judgment as a matter of law, *Johnson* is inapposite.[2]

3. Petitioner also errs in suggesting (Pet. 3-4) that this Court should grant review because the court of appeals' decision conflicts with previous decisions by the same court. Any intra-circuit conflict would, of course, be a matter for the Second Circuit to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). But there is no conflict in any event. The cases cited by petitioner both involved motions for judgment as a matter of law that were filed more than ten days *after* judgment was entered. See *Weissman* v. *Dawn Joy Fashions, Inc.*, 214 F.3d 224, 228, 230 (2d Cir. 2000) (per curiam); *Fruit of the Loom, Inc.* v. *American Mktg. Enters., Inc.*, 192 F.3d 73, 74 (2d Cir. 1999) (per curiam). Those cases thus do not address the issue presented by this case: whether a motion filed *before* formal entry of judgment satisfies Rule 50(b).

4. Finally, petitioner is wrong in contending (Pet. 4-5) that the court of appeals' decision is inconsistent with the policy of finality that underlies Rule 50. Rule 50(b) provides that the district court litigation ends *unless* a party files a motion for judgment as a matter of law or a motion for a new trial no later than ten days after entry of judgment. Because the FDIC did so, there was no finality interest to preserve.

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[2] Moreover, Rule 50(b) has been substantively amended three times since *Johnson* was decided. See Fed. R. Civ. P. 50 advisory committee's notes (1963 amend., 1987 amend., 1995 amend.).

Petitioner erroneously suggests (Pet. 4) that he was entitled to rely on the "final[ity]" of the July 22, 2000 judgment that was mechanically entered by the clerk's office. See Fed. R. Civ. P. 58(1) (stating that the clerk "shall * * * enter the judgment without awaiting any direction by the court" after "a general verdict of a jury"). But, as the court of appeals recognized, that order could not have created any justifiable expectation of finality, both because it did not purport to resolve the FDIC's pending motion for judgment as a matter of law and because it was signed by a deputy clerk—a person who had no authority to resolve that motion. Pet. App. 5a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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